United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1151

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-1151

UNITED STATES OF AMERICA

PLAINTIFF - APPELLEE

VS

FRANK MESSENGER

DEFENDANT - APPELLANT

BRIEF OF DEFENDANT - APPELLANT

FRANK MESSENGER

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TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	1
STATUTES INVOLVED	3
ISSUES PRESENTED	4
THE FACTS	5
ARGUMENT	
I. There was insufficient evidence from which the jury could infer guilty beyond a reasonable doubt.	13
CONCLUSION	17
CERTIFICATION	18

TABLE OF CASES

	PAGE
Hernandez v. United States, 300 F. 2d 114 (9th Cir. 1962)	15
Ingram v. United States, 360 U.S. 672, 677-680 (1958)	16
United States v. Docherty, 468 F. 2d 889,992 (2d Cir. 1972)	15
United States v. Gallishaw, 428 F. 2d 760 (2d Cir. 1970)	13, 14
United States v. Short, 493 F. 2d 1170 (9th Cir. 1974)	14, 15
United States v. Taylor, 464 F. 2d 240 (2d Cir. 1972)	16

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STATEMENT OF THE CASE

This is an appeal from a judgment imposed upon defendant Frank Messenger on a two count indictment returned by a grand jury of the District of Connecticut on April 9, 1974 against defendant Frank Messenger and co-defendant Ronald DiStassio.

Count one of the indictment charged co-defendant DiStassio with having used extortionate means to collect an extension of credit, on or about March 1, 1973, in violation of 18 U.S.C. Section 894 (1a).

Count two of the indictment charged both DiStassio and Messenger with having used extortionate means to collect an extension of credit, on or about October 4, 1973, in violation of 18 U.S.C. section 894(1a, 2a).

Trial by jury commenced on November 19, 1974 before Honorable Robert C. Zampano, Judge, U. S. District Court, at New Haven, Connecticut.

Messenger's motion for judgment of acquittal at the close of the Government's evidence was denied.

On November 27, 1974 the jury returned verdicts of guilty against DiStassio as to Counts one and two and a verdict of guilty against Messenger as to Count two.

A judgment of conviction was entered by Hon. Robert C. Zampano on March 26, 1975 adjudging Messenger guilty as charged under Count two and sentencing him to imprisonment for a period of four (4) years (3a).

Thereafter, Messenger filed a timely motion for judgment of acquittal or in the alternative for a new trial, which motion was denied by the Court.

Notice of Appeal from the judgment of conviction was filed by Frank Messenger on March 31, 1974.

STATUTES INVOLVED

18. U.S.C. § 2 Principals

a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

18 U.S.C. § 891 Definitions and rules of Construction

* * * *

7) An extortionate means is any means which involves the use or an express or implicit threat of use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

* * * *

18. U.S.C. § 894 Collection of extensions of credit by Extortionate means

a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or
(2) to punish any person for the nonpayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

* * * *

ISSUES PRESENTED

1. Did the government produce sufficient evidence against the defendant to warrant submission of the case to the jury?

FACTS

Although charged as a principal in Count two of the indictment the Government proceeded on the theory that Messenger aided and abetted DiStassio in the use of extortionate means to collect a gambling debt owed by one John Alicki to DiStassio (T.437).

Alicki testified that he had been wagering on football games with DiStassio in July of 1971 (T. 35) and that by October, 1971 owed him $1,200.00 (T. 4,5). In August, 1971, Alicki had sold his co-op at Stone Ridge and later received a check in the net amount of $822.02 (T. 6,7; Gov't Ex. A). Alicki then gave the check to DiStassio thereby reducing his indebtedness to approximately $400.00.

Inasmuch as Messenger was not involved with the aforesaid wagering and financial transactions, the check was offered and admitted into evidence only against DiStassio (T. 6, 7, 9, 375).

Alicki further testified that:

1. He had never seen Messenger, never talked with him and did not know who he was (6a, 7a, 8a).

2. He never had any wagering transactions with Messenger (4a,5a).

3. He had never seen Messenger at his home nor had Messenger ever called him (5a,8a).

While Alicki was AWOL he would have to "duck" the F. B. I. so he would spend these nights either drinking or gambling at the horseraces almost every night of the week (T. 117, 119).

Alicki admitted that he never had reason to believe that something might happen to his family (9 a).

On October 4, 1973, he left the house at approximately 9:30 P.M. to go drinking at a local bar (T. 64). He returned home at 11:35 P.M. (T. 14, 74) and then went upstairs and asked his wife to make coffee. She told him that she smelled smoke and he ran downstairs looking for a fire (T. 15). He saw his car burning in the garage (T. 16). He telephone the fire department three (3) minutes after he came home, i.e. 11:38 P.M. (T. 75).

The inside of the car was in flames so he got a

hose and put the fire out. (T. 18, 75, 76). He did not know how the fire was started and did not see either Messenger or DiStassio that night (T. 76).

Phyllis Alicki's testimony, insofar as it relates to Messenger in Count two, went as follows:

On October 4, 1973, her husband left the house after supper, about 6:00 or 6:30 P.M. and told her he was going to the club. (T. 361, 362).

At 11:30 P.M. she heard the doorbell ring and stuck her head out of the front window. She resided on the second floor of a two-story dwelling (T. 228, 229; Def't. Exs. 2-6). She looked down and saw two men standing on the first step of the front porch. She asked who it was and one of the men said "Ronny" (T. 230) and she then asked "Ronny who?" (T. 287) and he said "Ronny DiStassio" and asked "Is John home?". She replied "No, he's probably down the club". Nothing more was said. (T. 230,231).

The other man, who she identified as Messenger, just stood there and never said anything (T. 231, 233).

She then observed them leave the porch and turn around the corner of the house, out of her view, heading

towards the rear of the driveway (T. 233, 234).

She remained by the window and saw them walk back out front. They then went into a car parked in front of the house, Messenger on the driver's side and DiStassio on the passenger's and drove off (T. 235).

When the car was in front of her house, the lights were on and the motor was running (T. 235).

After she saw them go around the side of the house, she did not try to follow them by looking out either side or rear windows (T. 344) and never saw them go into the garage (T. 353).

She had not looked out any of her windows prior to 11: 30 that evening and did not know whether or not anyone else had been in the rear of the house (T. 343, 344, 360, 361).

She testified that if anyone had been near the back-yard, the dog downstairs would have barked (T. 344). She did not hear the dog bark all night (T. 345).

Mrs. Alicki was not worried about anything happening when she saw them disappear around the side of the house (T. 354), and the only thing she mentioned to her husband upon his return was that"Ronny was here". He made no reply (T. 236).

Frederick Zwerdlein, an Assistant Chief in the Bridgeport Fire Department testified that the alarm was received at exactly 12:00 A.M. and he arrived there about two or three minutes later (T. 390).

The fire was extinguished when he arrived (T. 390, 409) and the police had already arrived (T. 408).

From his observations he concluded that there had been two separate fires. One from underneath the car and the other from the front seat of the car (T. 386, 387, 388, 412, 413). He also observed some debris, i. e. paper material, similar in appearance, around the car (T. 392, 411, 412, 414, 415) and inside the car (T. 388).

Based on these observations, it was Zwedlein's opinion that the fire was "apparently incendiary". There is a difference between "apparently incendiary" and "incendiary", the latter requiring more proof. He did not have enough proof to make a determination that the fire was "incendiary" (T. 401, 402).

Zwerdlein also testified that cardboard and newspapers burn very quickly and that the fire had only been burning for a few minutes by the time the fire department arrived (T. 403, 404) and it was still burning

when the fire department got there. In his opinion, the fire started at approximately between 11:45 P.M. and 11:55 P.M. (T. 406, 407).

Messenger took the stand in his own defense and testified that he resided in Newtown, Connecticut with his wife and three of his five children, and owned a restaurant called the Sandy Hood Restaurant (T. 451, 452).

He did not work his restaurant on Tuesday and Thursday, his partner would take over and he usually came to Bridgeport on those nights. He had lived in Bridgeport all his life and he had many friends there. His wife came to Bridgeport every day and his son and daughter lived there (T. 466, 467, 500, 501).

On October 4, 1973, which fell on a Thursday, he came to Bridgeport arriving at about 6:00 - 6:30 P.M. (T. 466). He met a group of about 9 or 10 people there including his daughter Linda Palmer and DiStassio (T. 452, 454). They all went to the Pompeii Restaurant for dinner and arrived at approximately 7:30 - 7:45 P.M. (T. 454).

Messenger paid the bill with his Master Charge card. The bill totalled $126.40 and the receipt was introduced into evidence (T. 626, 627 & Deft's Ex. 11).

They then went back to Bridgeport to the Mark III, a bar which had music on Thursday nights, arriving there between 9:30 - 9:45 P.M. (T. 477, 478).

That evening his daughter, Linda, had told him that she was getting annoying calls from a John Alicki (T. 456, 457). She had mentioned this prior in the evening also and had also mentioned it on several other occasions within the past couple of months (T. 486).

Messenger asked if anyone knew who John Alicki was and Ronny thought he did. Another member of the group, Mr. Buswell, also knew him and knew where he lived (T. 457).

Messenger had never met nor seen Mr. Alicki or his wife (T. 457).

Since DiStassio knew who Alicki was, Messenger asked him to go with him to find Alicki and tell him to leave his daughter alone (T. 480, 481), especially since Ronny had mentioned Alicki was married (T. 501).

Messenger never knew that DiStassio and Alicki knew each other until that night (T. 483).

When they located the house, DiStassio rang the bell and asked Mrs. Alicki if John was home and she said no, that she thought he was down the club (T. 459, 461, 491).

They then walked across the lawn and driveway to Messenger's car and left (T. 460, 461).

Messenger decided to look for Alicki at the "Club" so they went there at about 10:00 P.M. but Alicki was not there. Ronny said he knew Alicki hung around there. They then returned to the Mark III (T. 461, 462).

Messenger denied ever going down Alicki's driveway or in his garage or burning his car (T. 463).

DiStassio likewise testified in his own defense and corroborated Messenger's testimony insofar as the sequence of the events of October 4, 1973, as did Linda Palmer and Delores Kistner.

During the jury's deliberations, it sent the Judge the following note:

> "Your Honor - Please instruct us re Defendant Messenger .... must all three elements be prooved by Prosecution i.e. (1) Extension of Credit, (2) Extortionary means to collect, (3) Wilfull/knowingly .... Does Government need prove Messenger knew about the debt, Willis Foreman." (10a)

Although the Court, in essence, answered the questions in the affirmative,and despite the fact that the Government had totally failed to prove that Messenger knew of the debt, the jury returned a verdict of guilty against him on Count Two.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO ALLOW THE JURY TO CONCLUDE THAT MESSENGER WAS GUILTY BEYOND A REASONABLE DOUBTOF THE CRIME CHARGED.

In order to convict Messenger of the substantive crimeof aiding and abetting a violation of 18 U.S.C. §894, the Government would have had to prove, at a minimum, that (a) he knew of the existence of the debt from Alicki to DiStassio and (b) that his purpose in going to Alicki's house with DiStassio and burning the car was to aid DiStassio in the extortionate collection of the debt.

See United States v. Gallishaw, 428 F. 2d 760 (2d Cir. 1970)

There is not an iota of evidence in the entire record whereby the Government connected Messenger with Alicki's debt to DiStassio.

Viewed in that light, Messenger's reason for going to Alicki's house, viz., to tell Alicki to leave his daughter alone, (T. 457, 480, 481) thus seems all the more convincing.

In Gallishaw, this Court held that a supplier of a machine gun which was used in a bank robbery could not be convicted as an aider and abetter of a violation of 18 U.S.C. §2113(a) without knowledge that the gun was to be used in the bank robbery. The fact that the supplier knew the gun was

to be used "to do something wrong" or "to violate the law" would not suffice. United States v. Gallishaw, at p. 763.

Likewise, in United States v. Short, 493 F. 2d 1170 (9th Cir. 1974), a bank was robbed by one,John Seymour who used a gun during the robbery. The defendant was charged in Count two with having assaulted or put in jeopardy the life of a bank teller by the use of a dangerous weapon, a handgun, in violation of 18 U.S.C. §2113(d). Although Short was charged as a principal, the case was tried and the jury was charged on the theory that he was an aider and abetter.

Despite various incriminating factors in the case, "There was no direct evidence that Short knew that Seymour had a gun or that Seymour intended to use it." United States v. Short, at p. 1171.

After a period of deliberation, the jury returned to the Courtroom and asked the Judge if "the defendant had to know Seymour had a gun to be guilty on the second indictment."

The Judge responded, inter alia, that whether or not Short knew that Seymour was armed or what he was armed with, was not a necessary element of the crime.

The Court found this instruction to be erroneous and held:

> "An essential element of armed robbery as charged here is that the principal was armed and used the weapon to jeopardize the life of the teller. It is this conduct that Short must be shown to have aided and abetted. 'An aider and abettor is made punishable as a principal....and the proof must encompass the same elements as would be required to convict any other principal.' Hernandez v. United States, 9 Cir. 1962, 300 F. 2d 114, 123. Thus the jury must be told that it must find that Short knew that Seymour was armed and intended to use the weapon, and intended to aid him in that respect." (Emphasis Added) United States v. Short, at p. 1172.

The gravamen of the federal crime charged against Messenger is the aiding and abetting in the use of extortionate means (burning the car) for the purpose of collecting the gambling debt owed by Alicki.

Obviously, the burning of a car for some other purpose, e. g. as a warning to Alicki to stay away from Messenger's daughter Linda, would not be conduct prohibited by U.S.C. §894, albeit, such conduct would be violative of state arson laws.

> "When a defendant is charged simply as an aider and abetter, submission to the jury is warranted only if there is enough evidence to show that he knew of such activity of the principal and desired to forward it."
>
> United States v. Docherty, 468 F.2d 889, 992 (2d Cir. 1972)

Since there is no proof whatsoever that Messenger even knew of the debt, the Judge erred in denying Messenger's motions for judgment of acquittal and his conviction under 18 U.S.C. §894 cannot stand. See Ingram v. United States 360 U.S. 672, 677-680 (1958).

Even when viewed most favorably to the Government, the evidence is not sufficient to meet the standard for criminal cases in the Second Circuit as enunciated in United States vs Taylor:

> "Whether the reasonable mind of a juror could draw such an inference from [the evidence] so that he might fairly conclude guilty beyond a reasonable doubt."
>
> 464 F2d 240, 244-245
> (2d Cir. 1972)

Quite aside from the foregoing, Chief Zwerdling's testimony raises more questions as to Messenger's and DiStassio's criminal responsibility for the fire than it answers.

His observation that the newspapers and cardboard underneath the car would burn very quickly and that it was still burning when he got there would point to the innocence of Messenger and DiStassio, since they would have already left before the fire started.

Furthermore, his lack of sufficient proof upon

which to base a finding of "incendiary" as opposed to "apparently" incendiary, should not, in all fairness, furnish a basis for conviction upon such serious charges.

These critical facts, in combination with the inexplicable delay of over seven months between the telephone call to Mrs. Alicki in late February, 1973 and the burning of the car on October 4, 1973 were such that no reasonable juror could have fairly concluded guilt beyond a reasonable doubt.

CONCLUSION

The Defendant-Appellant, for all the reasons stated herein, respectfully requests this Court to reverse his conviction or in the alternative, to reverse his conviction and to remand for a new trial.

Respectfully submitted,

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CERTIFICATION

This is to certify that on July 3, 1975 a copy of this brief was mailed first class postage prepaid to the Office of the United States Attorney, 141 Church Street, New Haven, Connecticut and to Peter Casey, Special Assistant U.S. Attorney, 450 Main Street, Hartford, Connecticut.

Charles Hanken

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